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IN THE

Supreme Court of the United States

NOVEMBER TERM, A.D. 1971

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents,

and

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS CO., et al.,

Respondents.

**BRIEF FOR CORPORATION RESPONDENTS
M. WEIL AND SONS, INC., ET AL.**

This respondent is an Illinois corporations, and, in this proceeding, has been declared by Illinois' courts properly to have maintained its action not only as an individual corporation, but, as a representative of every corporation in the State of Illinois, and that each member of this class of corporate entities is adequately and competently represented herein. (App. 16.)

These respondents believe a more ready identification of the numerous parties before this Court may best be served if these respondents refer to themselves here as "Corporations."

Corporations understand that the petition for writ of certiorari filed by Cook County defendants stands as the "Brief" for those petitioners. Corporations agree with the "Constitutional Provisions Involved" and the "Statement of the Case" as set out therein (pages 5 through 17) and adopt the same as Corporations presentation here.

QUESTION PRESENTED FOR REVIEW

Whether a State constitutional amendment violates the equal protection clause of the 14th Amendment to the Constitution of the United States because it retains an *ad valorem* tax solely on the personal property of corporations while removing that tax from the personal property of all other persons and business entities; all of whom, prior to such amendment were members of the same class, and the personal property of each was subject by State Constitution to the levy of "a tax, by valuation, so that every person and corporation shall pay a tax in proportion of his, her, or its property . . ." (Ill. Const. (1870) Article IX, Section 1).

ARGUMENT**I.**

ARTICLE IX-A OF ILLINOIS CONSTITUTION OF 1870 OFFENDS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES UPON THE GROUNDS ASSIGNED IN, AND REASONS APPARENT FROM, THE OPINION ISSUED BY THE SUPREME COURT OF ILLINOIS.

Corporations adopt, and respectfully submit the opinion of the Supreme Court of Illinois, as their argument, and the judgment rendered by that Court as their position to this Court under this Point, as if that opinion and judgment were here set out in full. (App. 18-33).

The judgment of the Supreme Court of Illinois is correct. This Court should so hold.

II.

CORPORATIONS CONTEND THAT, IF ARTICLE IX-A OF THE 1870 CONSTITUTION OF THE STATE OF ILLINOIS EXCLUDES ONLY THE PROPERTY OWNED BY NATURAL PERSONS, BUT DENIES THAT SAME EXCLUSION TO CORPORATIONS, THEN SUCH CLASSIFICATION IS DISCRIMINATORY, UNREASONABLE AND DENIES DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAW GUARANTEED TO THEM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

As all laws in the State of Illinois must be obedient to Illinois' Constitution, so too, each of the Constitutions

of each of the 50 States of the Union is required to owe its allegiance to the Constitution of the United States.

It has long been held that State statutes relating to taxation must not violate the right under the Constitution of the United States to equal protection of the law. State constitutional clauses, equally with "statutes", must not be violative of, and may be reviewed in light of, confinements imposed by the Constitution of the United States. See *Railway Express Agency v. Virginia* (1931) 282 U.S. 440. The limitation imposed by the requirement of equal protection of the laws denies to government the right to tax businesses, with arbitrary discrimination.

Illumined by these precepts, Illinois' Constitution of 1870, emerges, and, as amended by Article IX-A, is discerned to have assumed the form hereinafter described.

Illinois' Constitution of 1870 compels the imposition of a tax by valuation of all property in this State, and compels payment of that tax by every owner of that property.

Article IX is the "Revenue" Article of that Constitution and encompasses *all* matters which relate to the revenue of the State of Illinois.

Section 1 of Article IX declares:

"The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that *every person and corporation shall pay* a tax in proportion to the value of *his her, or its* property . . ." (Emphasis supplied).

Section 1 of Article IX-A, effective January 1, 1971, declares:

"Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*"

It is clear that both of the above Articles pertain to and deal with an ad valorem property tax, and that Article IX-A purports to exclude from that tax only the property belonging to certain owners described therein as "individuals."

Were this intent and such objective to be attributed to Article IX-A, then corporations respectfully submit that Article IX-A offends the Fourteenth Amendment to the Constitution of the United States because it denies to corporations, and to other entities who may not be considered to be "individuals", the equal protection of the law guaranteed to them by that Amendment.

This is so because then, the classification attempted by Article IX-A creates a distinction between two classes, one of which classes invokes imposition of the tax, the other class being excluded from that tax, which classification, however, in no way whatsoever, is based on, is related to, or even refers to any differences in the property, or in the characteristics of the property, or in the form of the property, or any other distinguishments upon which such classification could find any support under the law.

Rather, Article IX-A ignores the identity of the property between these two classes, which **property** constitutes the **object** upon which the tax is imposed; and, instead, declares that one type of **ownership** of that property **will invoke** the tax while another type of **ownership** is **excluded** from paying that tax.

Corporations submit that, the mere recitation of such effect, if Article IX-A were to be construed as intending such result, readily demonstrates repugnance to the Fourteenth Amendment to the Constitution of the United

States because of the apparent denial to corporations of the equal protection of the laws.

Corporations respectfully submit that Article IX-A, properly and validly construed, excludes from taxation the personal property owned by corporations as well as that owned by all others in the State of Illinois. The Supreme court of Illinois erred in not so holding. This Court should so hold.

If this court is of the opinion that Article IX-A excludes only the property owned by all others, then that Article denies to corporations the equal protection of the law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States; the exclusion attempted in Article IX-A must fall, and the property owned by all others is equally taxable with that of corporations. The Supreme court of Illinois correctly so held. This Court should so hold.

III.

CORPORATIONS CONTEND THAT, UNLESS THE EXCLUSION OF PROPERTY OWNED BY "INDIVIDUALS" IS CONSTRUED TO EXCLUDE THE PROPERTY OF CORPORATIONS AS WELL AS THAT OF NATURAL PERSONS, THEN THE EMPLOYMENT IN ARTICLE IX-A, OF THE TERM "INDIVIDUALS" IS SO VAGUE, UNCERTAIN, AND INCAPABLE OF DEFINITIVE APPLICATION TO THE CONTEXT OF ARTICLE IX THAT ARTICLE IX-A MUST FALL BECAUSE IT IS TOTALLY ABSENT THE COMPREHENSION REQUIRED, ESPECIALLY OF CONSTITUTIONAL PROVISIONS.

Article IX of Illinois Constitution of 1870, exclusively provides for, and pertains to all of Illinois' revenue and taxation.

Section 1 of Article IX declares:

"The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that *every person and corporation* shall pay a tax in proportion to the value of his, her, or its property . . ." (Emphasis supplied).

Section 3 of Article IX declares:

"The property of the state, counties . . ., both real and personal, and such other property as may be used exclusively for *agricultural and horticultural societies for school, religious, cemetery, and charitable purposes*, may be exempted from taxation . . ." (Emphasis supplied).

Section 6 of Article IX declares:

"The general assembly shall have no power to release or discharge any county . . ., or the *inhabitants* thereof, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, nor shall commutation for such taxes be authorized in any form whatsoever." (Emphasis supplied).

Section 10 of Article IX declares:

"The general assembly shall not impose taxes upon municipal corporations, or the *inhabitants or property thereof* for corporate purposes, but shall require that all the taxable property . . . shall be taxed . . . such taxes to be *uniform* in respect to *persons* and property . . ." (Emphasis supplied).

The foregoing constitutes every section in Article IX which contains any word, term, or descriptive noun similar in descriptive sense to the designation employed in Article IX-A.

Article IX-A purports to prohibit the taxation of personal property by valuation as to *individuals*.

Nowhere in all of Article IX, which Article exclusively directs the imposition of taxes in Illinois, does the word "individuals" appear.

Indeed, Illinois Revenue Act of 1939 (Ill. Rev. Stats. 1971, ch. 120, sec. 482, *et seq.*), which imposes the property taxes directed by Article IX to be imposed, is significantly absent that designation or description in the entire list of definitions contained in the very first section of that Act (sec. 482, ch. 120). Especially apparent, and, equally significant, is the fact that the definition of "Persons-Persons" in paragraph (18) of section 482 of that Act extends only to "Male, female, corporation, company, firm, society, singular or plural number". Even there "*individuals*" is denied recognition as a designation for purposes of taxation.

Nowhere does Article IX direct the imposition of a tax by valuation on property owned by *individuals*.

Article IX-A purports to exclude from taxation a category, "*individuals*", which is unknown to the Revenue Article of the Constitution.

Equally significant is the complete absence of the category "*individuals*," from the Revenue Act of 1939, which Act imposes the tax made mandatory by Article IX.

Illinois' Constitution directs no tax to be levied on "*individuals*."

Illinois' Revenue Statute imposes no tax on "*individuals*."

Article IX-A seeks both to prohibit taxation, and to retain taxation **nowhere imposed**.

Corporations respectfully submit that, unless the exclusion of Article IX-A applies to them as well as all other "*individuals*," Article IX-A must fall because that amend-

ment to Article IX permits no delineation comprehensible to, and compatible with the language apparent in Article IX.

Article IX-A, equally as well, violates Article II, section 22 of Illinois' Constitution, and the Fourteenth Amendment to the Constitution of the United States because it denies to due process of law.

It has long been the law that statutes which either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application transcend due process of law. Illinois has long so held: *People ex rel. Duffy v. Hurley*, 1949, 402 Ill. 562; *Missouri Pac. R. Cd. v. Illinois Commerce Commission*, 1948, 401 Ill. 214; *Boshuizen v. Thompson & Taylor Co.*, 1935, 360 Ill. 195.

State constitutional clauses come within the same circumference of confinements imposed by the Constitution of the United States as do statutes. *Railway Express Agency v. Virginia*, 1931, 282 U. S. 440.

Corporations submit that the uncertainty of the designation "individuals", and the non-application of that term to the context of Article IX, and to the Revenue Act of 1939, is so manifest on its face, that such apparency requires no further demonstration.

Amending Article IX-A is incomprehensible. The term "individuals" found there, finds no counterpart, image, identity, or reflection, either in the Revenue Article (Article IX) of Illinois Constitution of 1870, or in Illinois Revenue Act of 1939. Absence of application demands its demise.

Article IX-A is constitutionally offensive. The judgment of the Illinois Supreme court is correct.

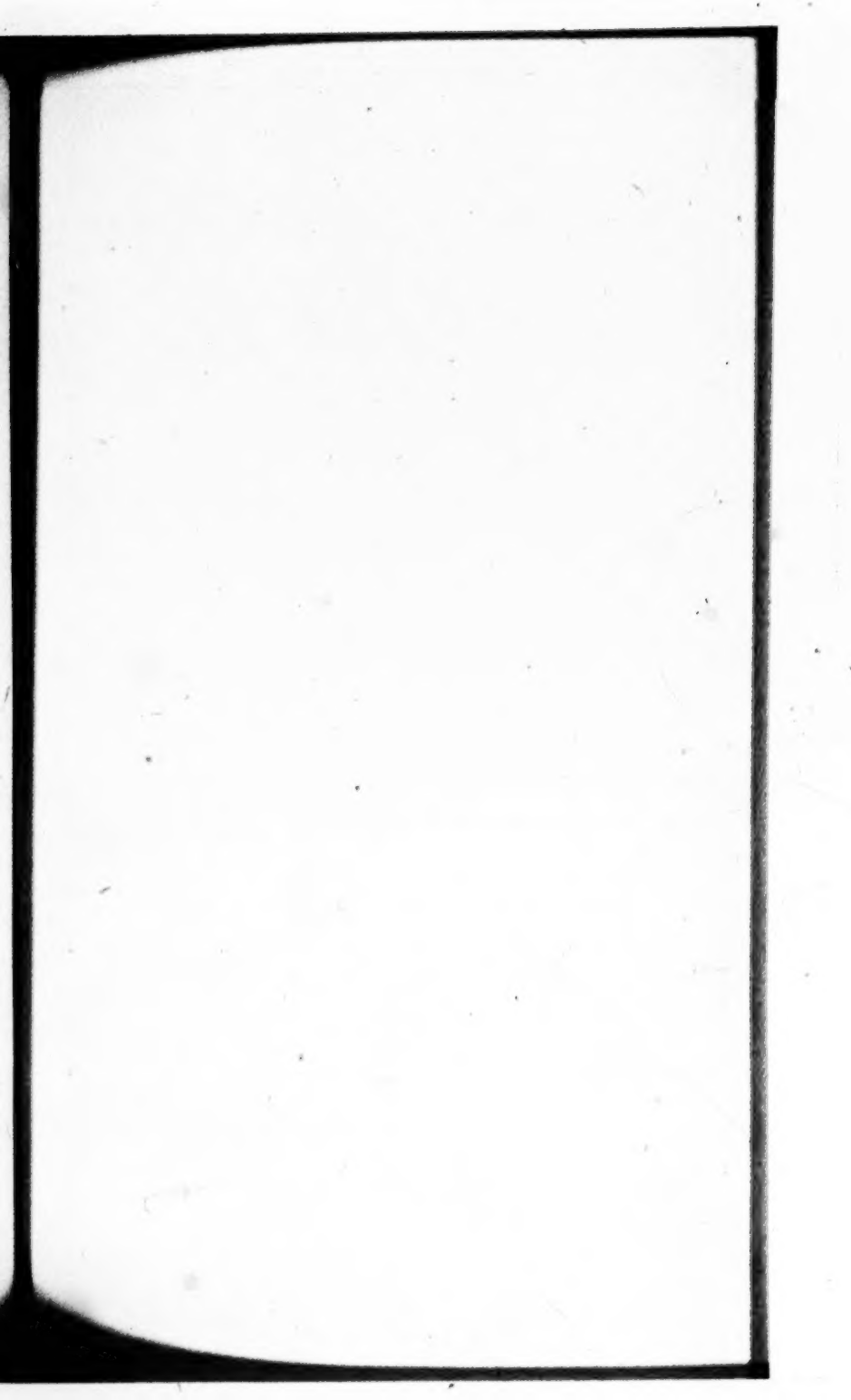
CONCLUSION

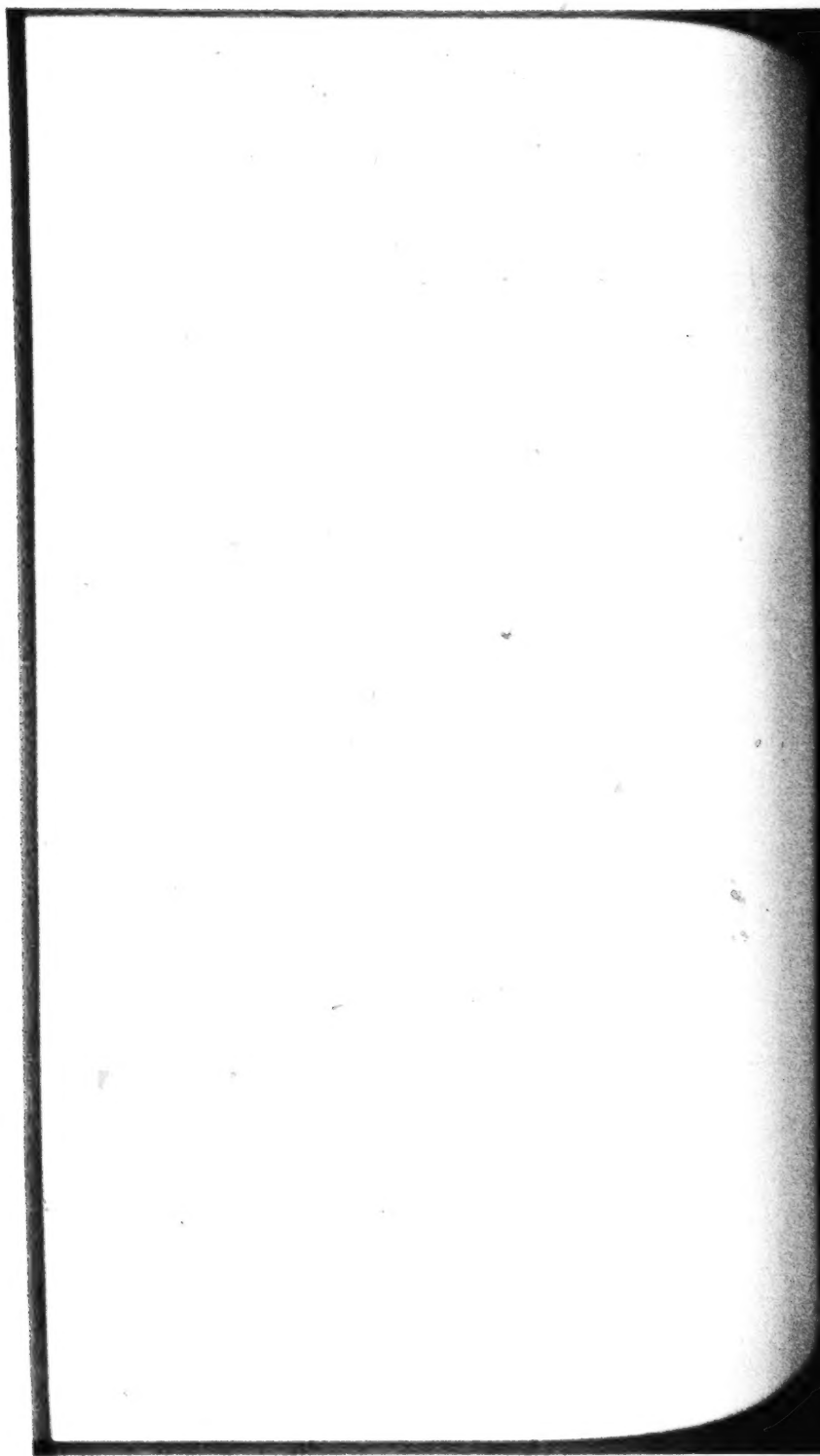
Corporations respectfully submit the correctness of the judgment, review of which is before this Court, and for the reasons and upon the grounds assigned here, as well as in the opinion issued by the court below, request this Court's affirmance of that court's judgment.

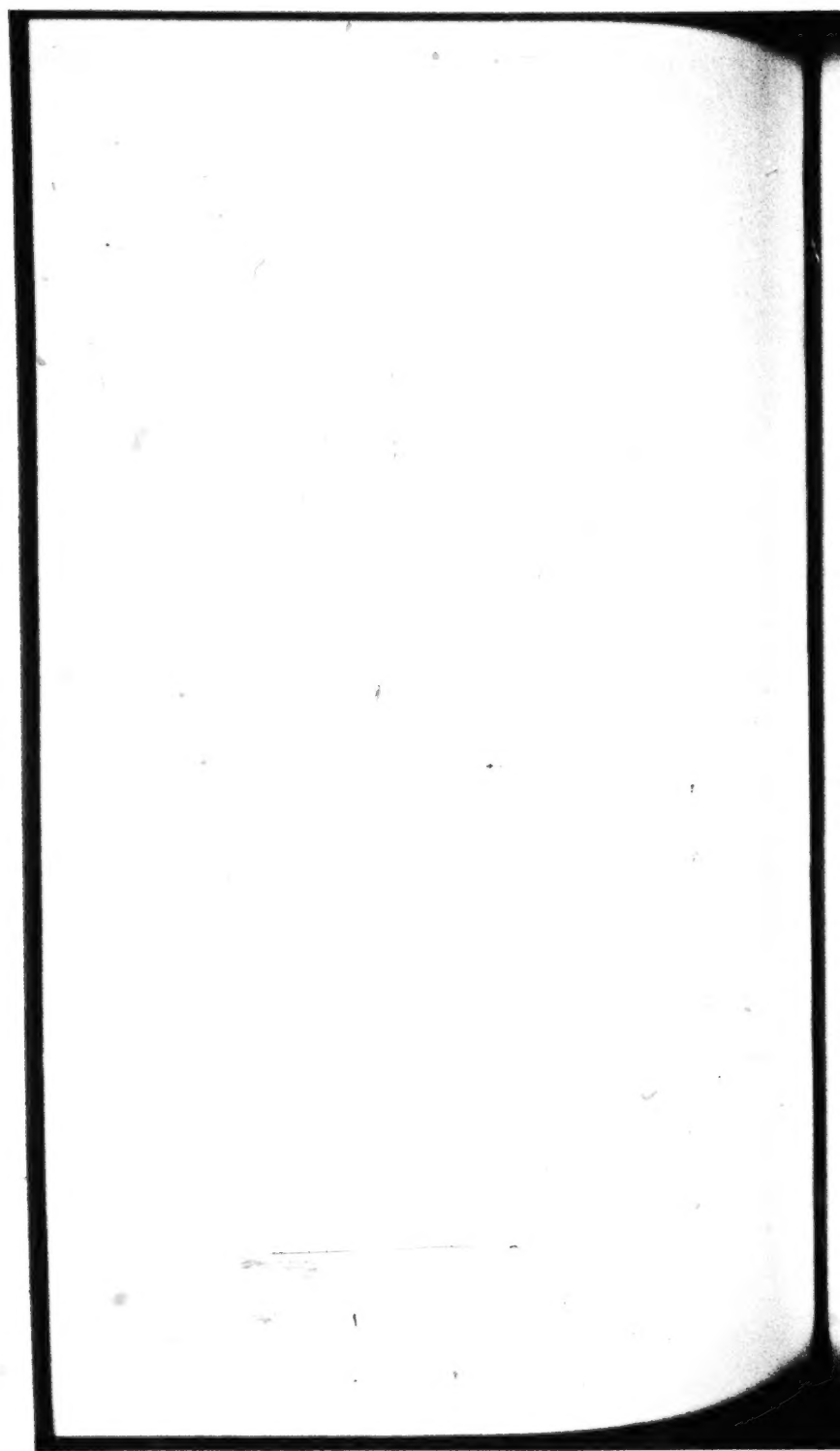
Respectfully submitted,

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IN THE

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No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County,
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Petitioners,

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CLEMENS K. SHAPIRO, et al.,

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and

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS CO., et al.,

Respondents.

**BRIEF OF PROPRIETOR RESPONDENTS
JEROME S. HERMAN, d/b/a THE SPOT, AND
GUY S. ROSS AND EUGENE R. ROSS, d/b/a
GUY S. ROSS & CO.**

This brief is filed in response to the briefs of petitioners Edward V. Hanrahan, State's Attorney of Cook County for Edward J. Barrett, County Clerk, et al., in the *Shapiro* case (No. 71-691) and William J. Scott, Attorney General of Illinois, attorney for Robert J. Lehnhausen, petitioner in No. 71-685, and to other "natural person" and corporate respondents who have taken positions adverse to the present proprietor respondents.

These respondents are Jerome Herman, an individual proprietor in Cook County, Illinois, doing business as The Spot, and a business partnership consisting of Guy S. Ross and Eugene D. Ross, d/b/a Guy S. Ross & Co., collectively called proprietors. Proprietors filed their complaint in the Circuit Court of Cook County as a class action for all similarly situated non-corporate businesses in Illinois, were declared proper class representatives by that court, and have represented the class of proprietorships, partnerships, and all other non-corporate business entities throughout these proceedings. Proprietors did not oppose the petitions for writ of certiorari. Proprietors' position is identical to the dissent by Mr. Justice Davis to the majority opinion of the Illinois Supreme Court; to the Brief filed in this case by the Attorney General *after* review was granted by this court; and to the Brief filed by the Governor of the State of Illinois as *amicus curiae*.

QUESTION PRESENTED FOR REVIEW

The question for review is:

"Whether a state constitutional provisions which distinguishes between corporations and individuals for the purpose of imposing an *ad valorem* tax on personal property violates the equal protection and due process clauses of the Fourteenth Amendment."

ARGUMENT**I.****THE CLASSIFICATION RECOGNIZED IN ILLINOIS CONSTITUTIONAL AMENDMENT ARTICLE IX-A, AND OVERWHELMINGLY APPROVED BY THE VOTERS, DISTINGUISHING BETWEEN THE PROPERTY OF "INDIVIDUALS" AND THE PROPERTY OF CORPORATIONS IS CONSTITUTIONAL.**

Proprietors are in a unique position under the posture of this case:

1. They adopt the Opinion issued by Illinois' Attorney General (Amended Petition for *cert.* of Lehnhausen in No. 71-685, App. 41-47).

2. They adopt the arguments made by Illinois' Attorney General for petitioner Lehnhausen in Case No. 71-685.

3. They adopt the arguments of the Governor of the State of Illinois contained in his "Amicus Curiae Brief in Support of Petition for Writ of Certiorari to the Supreme Court of Illinois" in No. 71-685.

4. They adopt the dissent filed by Mr. Justice Davis of the Illinois Supreme Court. (App. 33-44).

Positions adverse to that of proprietors are those advanced by:

1. The State's Attorney of Cook County, representing Cook County officials, petitioners in *Barrett v. Shapiro*, No. 71-691, who contends that "individuals" as used in Article IX-A amending the Illinois Constitution of 1870, pertains only to "natural persons" holding personal property for the personal use and enjoyment of themselves and their families as opposed to owning such property for a business use.

2. Clemens K. Shapiro, representing a class of all "natural persons" in Illinois, and a respondent along with these respondents in No. 71-691, who presents essentially the same arguments as the Cook County officials and whose position purports, as well, continued taxation of all "individuals" owning business property along with taxation of corporations.

3. M. Weil and Sons, Inc., an Illinois corporation, representing a class of all corporations, also a respondent in No. 71-691; and Lake Shore Auto Parts Co., another corporation and respondent in No. 71-685 (having previously been denied leave to withdraw from this case), both contending that taxation of corporations alone violates the equal protection provision of the Fourteenth Amendment.

Article IX-A amending the Illinois Constitution of 1870 provides: "Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

The Illinois Supreme Court interpreted the word "individuals" in Article IX-A which amended the 1870 Constitution of the State of Illinois, to retain the tax solely on corporations while excluding that tax on all others. The Court then concluded that a tax upon corporations and not *individuals* excluded under Article IX-A "violates the equal protection clause of the fourteenth amendment."

The Illinois Supreme Court has declared the word "individuals" to include all "natural persons" regardless of whether the personal property owned by them is used by them for their own personal purposes, or employed for business uses. That Court rejected the construction asserted by Shapiro and Cook County officials to the contrary, and held:

"We conclude that the meaning of Article IX-A is that *ad valorem* taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited". *Lake Shore Auto Parts Co. v. Korzen*, 49 Ill. 2d 137, 148 (1971).

This Court is left with the sole issue—does the classification between "individuals" and corporations approved in Constitutional Amendment Article IX-A violate the equal protection clause of the Fourteenth Amendment? Is there a rational basis for the differentiation in an *ad valorem* personal property tax between individuals (proprietorships and other non-corporate business entities) and corporations owning the same property used for business purposes?

For the reasons discussed briefly below, and as is already apparent from the briefs and appendices already on file, the taxation of corporations alone—after a constitutional referendum approving Article IX-A was overwhelmingly passed by the citizens and taxpayers of Illinois—is constitutionally permissible.

States are permitted flexibility and a variety of approaches in devising reasonable schemes of state taxation. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-7 (1959). The equal protection clause of the Fourteenth Amendment is not violated so long as a rational distinction can be drawn under any state of facts reasonably found to sustain the classification. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

The corporate form of doing business is a creature of statute, and corporate status is conferred in Illinois as a matter of grace. With the privilege of incorporation are benefits and liabilities, and the individual owners of any business may select from these advantages and disad-

vantages if they wish to incorporate, or if a corporation once formed is to be retained or dissolved.

The taxes imposed upon corporations are often different in kind and in amount from the same tax placed on other businesses, and taxes on corporation are many times unique to those entities. In *Thorpe v. Mahin*, 43 Ill. 2d 36 (1969), the Illinois Supreme Court upheld the recent income tax passed in Illinois which created a higher rate of taxation for corporations than for individuals. As Mr. Justice Davis stated in his dissent here, the distinction in classification between corporations and individuals was recognized and upheld in *Thorpe*, and should be upheld here. (App. 42).

The rule of law stated in *Quaker City Cab Co. v. Penn.*, 277 U.S. 389 (1928), to the extent that corporations rely upon that decision, has been superceded, distinguished and eroded by more recent cases dealing with the schemes of state taxation. (See e.g. *White River Co. v. Arkansas*, 279 U.S. 692 (1929) and *Amicus Brief of Governor*, p. 6, *et seq.*). Under the test stated by Mr. Justice Brandeis in that case, the equal protection clause only requires the classifications to be reasonable.

In the present case, the state legally performs a permissible function by classifying corporations under one broad category for tax purposes, which includes taxation of corporate personal property, while removing from taxation by referendum of the people all taxation directly upon "individuals" in the state. The corporation, being unique, is distinguishable from all other persons who have previously been subject to the onerous personal property tax in Illinois. The selection of the corporate form of doing business is not irrevocable and the individual shareholders, directors and officers may dissolve their

corporation for any reason—whether it be the high federal income tax rates levied or some local taxation corporations wish to avoid.

In Mr. Justice Davis' dissenting opinion (App. 33-44), heavy reliance is placed on *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276 (1932) and on an examination of Illinois' new Constitution of 1970, the very existence of which was ignored by the majority of that court, and in which constitution taxation according to the character of the owner is permitted under Section 5 (a) thereof. (App. 40). We endorse that dissent and adopt its rationale here.

It would be redundant, and respondents deem it unnecessary to further expand upon the arguments advanced in the dissenting opinion and the briefs on file.

CONCLUSION

For all of the foregoing reasons, proprietor-respondents respectfully pray that this Court reverse the judgment of the Illinois Supreme Court with directions and hold that Article IX-A is constitutional and excludes from taxation the class of *individuals* represented here, which class consists of all non-corporate business entities in Illinois.

Respectfully submitted,

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